

**Subpart S—Open Video Systems**

SOURCE: 61 FR 28708, June 5, 1996, unless otherwise noted.

**§ 76.1500 Definitions.**

(a) *Open video system*. A facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, provided that the Commission has certified that such system complies with this part.

(b) *Open video system operator (operator)*. Any person or group of persons who provides cable service over an open video system and directly or through one or more affiliates owns a significant interest in such open video system, or otherwise controls or is responsible for the management and operation of such an open video system.

(c) *Video programming provider*. Any person or group of persons who has the right under the copyright laws to select and contract for carriage of specific video programming on an open video system.

(d) *Activated channels*. This term shall have the same meaning as provided in the cable television rules, 47 CFR 76.5(nn).

(e) *Shared channel*. Any channel that carries video programming that is selected by more than one video programming provider and offered to subscribers.

(f) *Cable service*. This term shall have the same meaning as provided in the cable television rules, 47 CFR 76.5(ff).

(g) *Affiliated*. For purposes of this subpart, entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities.

(h) *Attributable Interest*. The term “attributable interest” shall be defined by reference to the criteria set forth in Notes 1 through 5 to § 76.501 provided, however, that:

(1) The limited partner and LLC/LLP/RLLP insulation provisions of Note 2(f) shall not apply; and

(2) The provisions of Note 2(a) regarding five (5) percent interests shall include all voting or nonvoting stock or

limited partnership equity interests of five (5) percent or more.

(i) *Other terms*. Unless otherwise expressly stated, words not defined in this part shall be given their meaning as used in Title 47 of the United States Code, as amended, and, if not defined therein, their meaning as used in Part 47 of the Code of Federal Regulations.

[61 FR 28708, June 5, 1996, as amended at 61 FR 43175, Aug. 21, 1996; 64 FR 67197, Dec. 1, 1999]

**§ 76.1501 Qualifications to be an open video system operator.**

Any person may obtain a certification to operate an open video system pursuant to Section 653(a)(1) of the Communications Act, 47 U.S.C. 573(a)(1), except that an operator of a cable system may not obtain such certification within its cable service area unless it is subject to “effective competition” as defined in Section 623(l)(1) of the Communications Act, 47 U.S.C. 543(l)(1). The effective competition requirement of the preceding sentence does not apply to a local exchange carrier that is also a cable operator that seeks open video system certification within its cable service area. A cable operator that is not subject to effective competition within its cable service area may file a petition with the Commission, seeking a finding that particular circumstances exist that make it consistent with the public interest, convenience, and necessity to allow the operator to convert its cable system to an open video system. Nothing herein shall be construed to affect the terms of any franchising agreement or other contractual agreement.

[65 FR 376, Jan. 5, 2000]

**§ 76.1502 Certification.**

(a) An operator of an open video system must certify to the Commission that it will comply with the Commission’s regulations in 47 CFR 76.1503, 76.1504, 76.1506(m), 76.1508, 76.1509, and 76.1513. The Commission must approve such certification prior to the commencement of service at such a point in time that would allow the applicant sufficient time to comply with the Commission’s notification requirements.

(b) Certifications must be verified by an officer or director of the applicant, stating that, to the best of his or her information and belief, the representations made therein are accurate.

(c) Certifications must be filed on FCC Form 1275 and must include:

(1) The applicant's name, address and telephone number;

(2) A statement of ownership, including all affiliated entities;

(3) If the applicant is a cable operator applying for certification in its cable franchise area, a statement that the applicant is qualified to operate an open video system under Section 76.1501.

(4) A statement that the applicant agrees to comply and to remain in compliance with each of the Commission's regulations in §§ 76.1503, 76.1504, 76.1506(m), 76.1508, 76.1509, and 76.1513;

(5) If the applicant is required under 47 CFR 64.903(a) of this chapter to file a cost allocation manual, a statement that the applicant will file changes to its manual at least 60 days before the commencement of service;

(6) A list of the names of the anticipated local communities to be served upon completion of the system;

(7) The anticipated amount and type (*i.e.*, analog or digital) of capacity (for switched digital systems, the anticipated number of available channel input ports); and

(8) A statement that the applicant will comply with the Commission's notice and enrollment requirements for unaffiliated video programming providers.

(d)(1) On or before the date an FCC Form 1275 is filed with the Commission, the applicant must serve a copy of its filing on all local communities identified pursuant to paragraph (c)(6) of this section and must include a statement informing the local communities of the Commission's requirements in paragraph (e) of this section for filing oppositions and comments. Service by mail is complete upon mailing, but if mailed, the served documents must be postmarked at least 3 days prior to the filing of the FCC Form 1275 with the Commission.

(2) Parties are required to attach a cover sheet to the filing indicating that the submission is an open video

system certification application. The only wording on this cover sheet shall be "Open Video System Certification Application" and "Attention: Media Bureau." This wording shall be located in the center of the page and should be in letters at least ½ inch in size. Parties shall also include the words "open video systems" on their mailing envelope.

(e)(1) Comments or oppositions to a certification must be filed within five calendar days of the Commission's receipt of the certification and must be served on the party that filed the certification. If, after making the necessary calculations, the due date for filing comments falls on a holiday, comments shall be filed on the next business day before noon, unless the nearest business day precedes the fifth calendar day following a filing, in which case the comments will be due on the preceding business day. For example, if the fifth day falls on a Saturday, then the filing would be due on that preceding Friday. However, if the fifth day falls on Sunday, then the filing will be due on the next day, Monday, before noon (or Tuesday, before noon if the Monday is a holiday).

(2) Parties wishing to respond to a FCC Form 1275 filing must submit comments or oppositions with the Office of the Secretary and the Bureau Chief, Media Bureau. Comments will not be considered properly filed unless filed with both of these Offices. Parties are required to attach a cover sheet to the filing indicating that the submission is a pleading related to an open video system application, the only wording on this cover sheet shall be "Open Video System Certification Application Comments." This wording shall be located in the center of the page and should be in letters at least 1/2 inch in size. Parties shall also include the words "open video systems" on their mailing envelopes.

(f) If the Commission does not disapprove the certification application within ten days after receipt of an applicant's request, the certification application will be deemed approved. If disapproved, the applicant may file a

revised certification or refile its original submission with a statement addressing the issues in dispute. Such re-filings must be served on any objecting party or parties and on all local communities in which the applicant intends to operate. The Commission will consider any revised or refiled FCC Form 1275 to be a new proceeding and any party who filed comments regarding the original FCC Form 1275 will have to refile their original comments if they think such comments should be considered in the subsequent proceeding.

[61 FR 28708, June 5, 1996, as amended at 61 FR 43175, Aug. 21, 1996; 62 FR 26238, May 13, 1997; 63 FR 31934, June 11, 1998; 65 FR 377, Jan. 5, 2000; 67 FR 13235, Mar. 21, 2002]

**§ 76.1503 Carriage of video programming providers on open video systems.**

(a) *Non-discrimination principle.* Except as otherwise permitted in applicable law or in this part, an operator of an open video system shall not discriminate among video programming providers with regard to carriage on its open video system, and its rates, terms and conditions for such carriage shall be just and reasonable and not unjustly or unreasonably discriminatory.

(b) *Demand for carriage.* An operator of an open video system shall solicit and determine the level of demand for carriage on the system among potential video programming providers in a non-discriminatory manner.

(1) *Notification.* An open video system operator shall file with the Secretary of the Federal Communications Commission a "Notice of Intent" to establish an open video system, which the Commission will release in a Public Notice. Parties are required to attach a cover sheet to the filing indicating that the submission is an Open Video System Notice of Intent. The only wording on this cover sheet shall be "Open Video System Notice of Intent" and "Attention: Media Bureau." This wording shall be located in the center of the page and should be in letters at least ½ inch in size. Parties shall also include the words "open video systems" on their mailing envelopes. Parties must submit copies of the Notice of Intent with the Office of the Sec-

retary and the Bureau Chief, Media Bureau. The Notice of Intent shall include the following information:

(i) A heading clearly indicating that the document is a Notice of Intent to establish an open video system;

(ii) The name, address and telephone number of the open video system operator;

(iii) A description of the system's projected service area;

(iv) A description of the system's projected channel capacity, in terms of analog, digital and other type(s) of capacity upon activation of the system;

(v) A description of the steps a potential video programming provider must follow to seek carriage on the open video system, including the name, address and telephone number of a person to contact for further information;

(vi) The starting and ending dates of the initial enrollment period for video programming providers;

(vii) The process for allocating the system's channel capacity, in the event that demand for carriage on the system exceeds the system's capacity; and

(viii) A certification that the operator has complied with all relevant notification requirements under the Commission's open video system regulations concerning must-carry and retransmission consent (§ 76.1506), including a list of all local commercial and non-commercial television stations served, and a certificate of service showing that the Notice of Intent has been served on all local cable franchising authorities entitled to establish requirements concerning the designation of channels for public, educational and governmental use.

(2) *Information.* An open video system operator shall provide the following information to a video programming provider within five business days of receiving a written request from the provider, unless otherwise included in the Notice of Intent:

(i) The projected activation date of the open video system. If a system is to be activated in stages, the operator should describe the respective stages and the projected dates on which each stage will be activated;

(ii) A preliminary carriage rate estimate;

(iii) The information a video programming provider will be required to provide to qualify as a video programming provider, e.g., creditworthiness;

(iv) Technical information that is reasonably necessary for potential video programming providers to assess whether to seek capacity on the open video system, including what type of customer premises equipment subscribers will need to receive service;

(v) Any transmission or reception equipment needed by a video programming provider to interface successfully with the open video system; and

(vi) The equipment available to facilitate the carriage of unaffiliated video programming and the electronic form(s) that will be accepted for processing and subsequent transmission through the system.

(3) *Qualifications of video programming providers.* An open video system operator may impose reasonable, non-discriminatory requirements to assure that a potential video programming provider is qualified to obtain capacity on the open video system.

(c) *One-third limit.* If carriage demand by video programming providers exceeds the activated channel capacity of the open video system, the operator of the open video system and its affiliated video programming providers may not select the video programming services for carriage on more than one-third of the activated channel capacity on such system.

(1) *Measuring capacity.* For purposes of this section:

(i) If an open video system carries both analog and digital signals, an open video system operator shall measure analog and digital activated channel capacity independently;

(ii) Channels that an open video system is required to carry pursuant to the Commission's regulations concerning public, educational and governmental channels and must-carry channels shall be included in "activated channel capacity" for purposes of calculating the one-third of such capacity on which the open video system operator and its affiliates are allowed to select the video programming for carriage. Such channels shall not be included in the one-third of capacity on which the open video system operator

is permitted to select programming where demand for carriage exceeds system capacity;

(iii) Channels that an open video system operator carries pursuant to the Commission's regulations concerning retransmission consent shall be included in "activated channel capacity" for purposes of calculating the one-third of such capacity on which the open video system operator and its affiliates are allowed to select the video programming for carriage. Such channels shall be included in the one-third of capacity on which the open video system operator is permitted to select programming, where demand for carriage exceeds system capacity, to the extent that the channels are carried as part of the programming service of the operator or its affiliate, subject to paragraph (c)(1)(iv); and

(iv) Any channel on which shared programming is carried shall be included in "activated channel capacity" for purposes of calculating the one-third of such capacity on which the open video system operator and its affiliates are allowed to select the video programming for carriage. Such channels shall be included in the one-third of capacity on which the open video system operator is permitted to select programming, where demand for carriage exceeds system capacity, to the extent the open video system operator or its affiliate is one of the video programming providers sharing such channel.

NOTE TO PARAGRAPH (c)(1)(iv): For example, if the open video system operator and two unaffiliated video programming providers each carry a programming service that is placed on a shared channel, the shared channel shall count as 0.33 channels against the one-third amount of capacity allocable to the open video system operator, where demand for carriage exceeds system capacity.

(2) *Allocating capacity.* An operator of an open video system shall allocate activated channel capacity through a fair, open and non-discriminatory process; the process must be insulated from any bias of the open video system operator and verifiable.

(i) If an open video system carries both analog and digital signals, an open video system operator shall treat

analog and digital capacity separately in allocating system capacity.

(ii) *Subsequent changes in capacity or demand.* An open video system operator must allocate open capacity, if any, at least once every three years, beginning three years from the date of service commencement. Open capacity shall be allocated in accordance with this section. Open capacity shall include all capacity that becomes available during the course of the three-year period, as well as capacity in excess of one-third of the system's activated channel capacity on which the operator of the open video system or its affiliate selects programming.

NOTE 1 TO PARAGRAPH (c)(2)(ii): An open video system operator will not be required to comply with the regulations contained in this section if there is no open capacity to be allocated at the end of the three year period.

NOTE 2 TO PARAGRAPH (c)(2)(ii): An open video system operator shall be required to accommodate changes in obligations concerning public, educational or governmental channels or must-carry channels in accordance with Sections 611, 614 and 615 of the Communications Act and the regulations contained in this part.

NOTE 3 TO PARAGRAPH (c)(2)(ii): An open video system operator shall be required to comply with the recordkeeping requirements of § 76.1712.

(iii) *Channel sharing.* An open video system operator may carry on only one channel any video programming service that is offered by more than one video programming provider (including the operator's video programming affiliate), provided that subscribers have ready and immediate access to any such programming service. Nothing in this section shall be construed to impair the rights of programming services.

NOTE 1 TO PARAGRAPH (c)(2)(iii): An open video system operator may implement channel sharing only after it becomes apparent that one or more video programming services will be offered by multiple video programming providers. An open video system operator may not select, in advance of any duplication among video programming providers, which programming services shall be placed on shared channels.

NOTE 2 TO PARAGRAPH (c)(2)(iii): Each video programming provider offering a programming service that is carried on a shared channel must have the contractual permission of the video programming service to

offer the service to subscribers. The placement of a programming service on a shared channel, however, is not subject to the approval of the video programming service or vendor.

NOTE 3 TO PARAGRAPH (c)(2)(iii): Ready and immediate access in this context means that the channel sharing is "transparent" to subscribers.

(iv) *Open video system operator discretion.* Notwithstanding the foregoing, an operator of an open video system may:

(A) Require video programming providers to request and obtain system capacity in increments of no less than one full-time channel; however, an operator of an open video system may not require video programming providers to obtain capacity in increments of more than one full-time channel;

(B) Limit video programming providers from selecting the programming on more capacity than the amount of capacity on which the system operator and its affiliates are selecting the programming for carriage; and

(v) Notwithstanding the general prohibition on an open video system operator's discrimination among video programming providers contained in paragraph (a) of this section, a competing, in-region cable operator or its affiliate(s) that offer cable service to subscribers located in the service area of an open video system shall not be entitled to obtain capacity on such open video system, except where a showing is made that facilities-based competition will not be significantly impeded.

(3) Nothing in this paragraph shall be construed to limit the number of channels that the open video system operator and its affiliates, or another video programming provider, may offer to provide directly to subscribers. Co-packaging is permissible among video programming providers, but may not be a condition of carriage. Video programming providers may freely elect whether to enter into co-packaging arrangements.

NOTE TO PARAGRAPH (c)(3): Any video programming provider on an open video system may co-package video programming that is

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selected by itself, an affiliated video programming provider and/or unaffiliated video programming providers on the system.

[61 FR 28708, June 5, 1996, as amended at 61 FR 43176, Aug. 21, 1996; 62 FR 26239, May 13, 1997; 65 FR 377, Jan. 5, 2000; 65 FR 53617, Sept. 5, 2000; 67 FR 13235, Mar. 21, 2002]

### § 76.1504 Rates, terms and conditions for carriage on open video systems.

(a) *Reasonable rate principle.* An open video system operator shall set rates, terms, and conditions for carriage that are just and reasonable, and are not unjustly or unreasonably discriminatory.

(b) *Differences in rates.* (1) An open video system operator may charge different rates to different classes of video programming providers, provided that the bases for such differences are not unjust or unreasonably discriminatory.

(2) An open video system operator shall not impose different rates, terms, or conditions based on the content of the programming to be offered by any unaffiliated video programming provider.

(c) *Just and reasonable rate presumption.* A strong presumption will apply that carriage rates are just and reasonable for open video system operators where at least one unaffiliated video programming provider, or unaffiliated programming providers as a group, occupy capacity equal to the lesser of one-third of the system capacity or that occupied by the open video system operator and its affiliates, and where any rate complained of is no higher than the average of the rates paid by unaffiliated programmers receiving carriage from the open video system operator.

(d) *Examination of rates.* Complaints regarding rates shall be limited to video programming providers that have sought carriage on the open video system. If a video programming provider files a complaint against an open video system operator meeting the above just and reasonable rate presumption, the burden of proof will rest with the complainant. If a complaint is filed against an open video system operator that does not meet the just and reasonable rate presumption, the open video system operator will bear the burden of proof to demonstrate, using the prin-

ciples set forth below, that the carriage rates subject to the complaint are just and reasonable.

(e) *Determining just and reasonable rates subject to complaints pursuant to the imputed rate approach or other market based approach.* Carriage rates subject to complaint shall be found just and reasonable if one of the two following tests are met:

(1) The imputed rate will reflect what the open video system operator, or its affiliate, “pays” for carriage of its own programming. Use of this approach is appropriate in circumstances where the pricing is applicable to a new market entrant (the open video system operator) that will face competition from an existing incumbent provider (the incumbent cable operator), as opposed to circumstances where the pricing is used to establish a rate for an essential input service that is charged to a competing new entrant by an incumbent provider. With respect to new market entrants, an efficient component pricing model will produce rates that encourage market entry. If the carriage rate to an unaffiliated program provider surpasses what an operator earns from carrying its own programming, the rate can be presumed to exceed a just and reasonable level. An open video system operator’s price to its subscribers will be determined by several separate costs components. One general category are those costs related to the creative development and production of programming. A second category are costs associated with packaging various programs for the open video system operator’s offering. A third category related to the infrastructure or engineering costs identified with building and maintaining the open video system. Contained in each is a profit allowance attributed to the economic value of each component. When an open video system operator provides only carriage through its infrastructure, however, the programming and packaging flows from the independent program provider, who bears the cost. The open video system operator avoids programming and packaging costs, including profits. These avoided costs should not be reflected in the price charged an independent program provider for carriage.

The imputed rate also seeks to recognize the loss of subscribers to the open video system operator's programming package resulting from carrying competing programming.

NOTE TO PARAGRAPH (e)(1): Examples of specific "avoided costs" include:

(1) All amounts paid to studios, syndicators, networks or others, including but not limited to payments for programming and all related rights;

(2) Packaging, including marketing and other fees;

(3) Talent fees; and

(4) A reasonable overhead allowance for affiliated video service support.

(2) An open video system operator can demonstrate that its carriage service rates are just and reasonable through other market based approaches.

[61 FR 28708, June 5, 1996, as amended at 61 FR 43176, Aug. 21, 1996]

**§ 76.1505 Public, educational and governmental access.**

(a) An open video system operator shall be subject to public, educational and governmental access requirements for every cable franchise area with which its system overlaps.

(b) An open video system operator must ensure that all subscribers receive any public, educational and governmental access channels within the subscribers' franchise area.

(c) An open video system operator may negotiate with the local cable franchising authority of the jurisdiction(s) which the open video system serves to establish the open video system operator's obligations with respect to public, educational and governmental access channel capacity, services, facilities and equipment. These negotiations may include the local cable operator if the local franchising authority, the open video system operator and the cable operator so desire.

(d) If an open video system operator and a local franchising authority are unable to reach an agreement regarding the open video system operator's obligations with respect to public, educational and governmental access channel capacity, services, facilities and equipment within the local franchising authority's jurisdiction:

(1) The open video system operator must satisfy the same public, educational and governmental access obligations as the local cable operator by providing the same amount of channel capacity for public, educational and governmental access and by matching the local cable operator's annual financial contributions towards public, educational and governmental access services, facilities and equipment that are actually used for public, educational and governmental access services, facilities and equipment. For in-kind contributions (e.g., cameras, production studios), the open video system operator may satisfy its statutory obligation by negotiating mutually agreeable terms with the local cable operator, so that public, educational and governmental access services to the community is improved or increased. If such terms cannot be agreed upon, the open video system operator must pay the local franchising authority the monetary equivalent of the local cable operator's depreciated in-kind contribution, or, in the case of facilities, the annual amortization value. Any matching contributions provided by the open video system operator must be used to fund activities arising under Section 611 of the Communications Act.

(2) The local franchising authority shall impose the same rules and procedures on an open video system operator as it imposes on the local cable operator with regard to the open video system operator's use of channel capacity designated for public, educational and governmental access use when such capacity is not being used for such purposes.

(3) The local cable operator is required to permit the open video system operator to connect with its public, educational and governmental access channel feeds. The open video system operator and the cable operator may decide how to accomplish this connection, taking into consideration the exact physical and technical circumstances of the cable and open video systems involved. If the cable and open video system operator cannot agree on how to accomplish the connection, the local franchising authority may decide. The local franchising authority may

require that the connection occur on government property or on public rights of way.

(4) The costs of connection to the cable operator's public, educational and governmental access channel feed shall be borne by the open video system operator. Such costs shall be counted towards the open video system operator's matching financial contributions set forth in paragraph (d)(4) of this section.

(5) The local franchising authority may not impose public, educational and governmental access obligations on the open video system operator that would exceed those imposed on the local cable operator.

(6) Where there is no existing local cable operator, the open video system operator must make a reasonable amount of channel capacity available for public, educational and governmental use, as well as provide reasonable support for services, facilities and equipment relating to such public, educational and governmental use. If a franchise agreement previously existed in that franchise area, the local franchising authority may elect either to impose the previously existing public, educational and governmental access obligations or determine the open video system operator's public, educational and governmental access obligations by comparison to the franchise agreement for the nearest operating cable system that has a commitment to provide public, educational and governmental access and that serves a franchise area with a similar population size. The local franchising authority shall be permitted to make a similar election every 15 years thereafter. Absent a previous franchise agreement, the open video system operator shall be required to provide channel capacity, services, facilities and equipment relating to public, educational and governmental access equivalent to that prescribed in the franchise agreement(s) for the nearest operating cable system with a commitment to provide public, educational and governmental access and that serves a franchise area with a similar population size.

NOTE TO PARAGRAPH (d)(6): This paragraph shall apply, for example, if a cable operator

converts its cable system to an open video system under § 76.1501.

(7) The open video system operator must adjust its system(s) to comply with new public, educational and governmental access obligations imposed by a cable franchise renewal; provided, however, that an open video system operator will not be required to displace other programmers using its open video system to accommodate public, educational and governmental access channels. The open video system operator shall comply with such public, educational and governmental access obligations whenever additional capacity is or becomes available, whether it is due to increased channel capacity or decreased demand for channel capacity.

(8) The open video system operator and/or the local franchising authority may file a complaint with the Commission, pursuant to our dispute resolution procedures set forth in § 76.1514, if the open video system operator and the local franchising authority cannot agree as to the application of the Commission's rules regarding the open video system operator's public, educational and governmental access obligations under paragraph (d) of this section.

(e) If an open video system operator maintains an institutional network, as defined in Section 611(f) of the Communications Act, the local franchising authority may require that educational and governmental access channels be designated on that institutional network to the extent such channels are designated on the institutional network of the local cable operator.

(f) An open video system operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this subsection, provided, however, that any open video system operator may prohibit the use on its system of any channel capacity of any public, educational, or governmental facility for any programming which contains nudity, obscene material, indecent material as defined in § 76.701(g), or material soliciting or promoting unlawful conduct. For purposes of this section, "material soliciting or promoting unlawful conduct" shall



mean material that is otherwise proscribed by law. An open video system operator may require any access user, or access manager or administrator agreeing to assume the responsibility of certifying, to certify that its programming does not contain any of the materials described above and that reasonable efforts will be used to ensure that live programming does not contain such material.

[61 FR 28708, June 5, 1996, as amended at 61 FR 43176, Aug. 21, 1996]

EFFECTIVE DATE NOTE: At 61 FR 43176, Aug. 21, 1996, in § 76.1505, paragraphs (d)(1), (4), (6), and (8) were revised. These paragraphs contain information collection and record-keeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

**§ 76.1506 Carriage of television broadcast signals.**

(a) The provisions of Subpart D shall apply to open video systems in accordance with the provisions contained in this subpart.

(b) For the purposes of this Subpart S, television stations are significantly viewed when they are viewed in households that do not receive television signals from multichannel video programming distributors as follows:

(1) For a full or partial network station—a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent; and

(2) For an independent station—a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent. See § 76.1506(c).

NOTE TO PARAGRAPH (b): As used in this paragraph, “share of viewing hours” means the total hours that households that do not receive television signals from multichannel video programming distributors viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the period, and “net weekly circulation” means the number of households that do not receive television signals from multichannel video programming distributors that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total households that do not receive television signals from multichannel video programming distributors in the survey area.

(c) *Significantly viewed signals; method to be followed for special showings.* Any provision of § 76.54 that refers to a “cable television community” or “cable community or communities” shall apply to an open video system community or communities. Any provision of § 76.54 that refers to “non-cable television homes” shall apply to households that do not receive television signals from multichannel video programming distributors. Any provision of § 76.54 that refers to a “cable television system” shall apply to an open video system.

(d) *Definitions applicable to the must-carry rules.* Section 76.55 shall apply to all open video systems in accordance with the provisions contained in this section. Any provision of § 76.55 that refers to a “cable system” shall apply to an open video system. Any provision of § 76.55 that refers to a “cable operator” shall apply to an open video system operator. Any provision of § 76.55 that refers to the “principal headend” of a cable system as defined in § 76.5(pp) shall apply to the equivalent of the principal headend of an open video system. Any provision of § 76.55 that refers to a “franchise area” shall apply to the service area of an open video system. The provisions of § 76.55 that permit cable operators to refuse carriage of signals considered distant signals for copyright purposes shall not apply to open video system operators. If an open video system operator cannot limit its distribution of must-carry signals to the local service area of broadcast stations as used in 17 U.S.C. 111(d), it will be liable for any increase in copyright fees assessed for distant signal carriage under 17 U.S.C. 111.

(e) *Signal carriage obligations.* Any provision of § 76.56 that refers to a “cable television system” or “cable system” shall apply to an open video system. Any provision of § 76.56 that refers to a “cable operator” shall apply to an open video system operator. Section 76.56(d)(2) shall apply to open video systems as follows: An open video system operator shall make available to every subscriber of the open video system all qualified local commercial television stations and all qualified non-commercial educational television

stations carried in fulfillment of its carriage obligations under this section.

(f) *Channel positioning.* Open video system operators shall comply with the provisions of § 76.57 to the closest extent possible. Any provision of § 76.57 that refers to a “cable operator” shall apply to an open video system operator. Any provision of § 76.57 that refers to a “cable system” shall apply to an open video system, except the references to “cable system” in § 76.57(d) which shall apply to an open video system operator.

(g) *Notification.* Any provision of § 76.58 that refers to a “cable operator” shall apply to an open video system operator. Any provision of § 76.58 that refers to a “cable system” shall apply to an open video system. Any provision of § 76.58 that refers to a “principal headend” shall apply to the equivalent of the principal headend for an open video system.

(h) *Modification of television markets.* Any provision of § 76.59 that refers to a “cable system” shall apply to an open video system. Any provision of § 76.59 that refers to a “cable operator” shall apply to an open video system operator.

(i) *Compensation for carriage.* Any provision of § 76.60 that refers to a “cable operator” shall apply to an open video system operator. Any provision of § 76.60 that refers to a “cable system” shall apply to an open video system. Any provision of § 76.60 that refers to a “principal headend” shall apply to the equivalent of the principal headend for an open video system.

(j) *Disputes concerning carriage.* Any provision of § 76.61 that refers to a “cable operator” shall apply to an open video system operator. Any provision of § 76.61 that refers to a “cable system” shall apply to an open video system. Any provision of § 76.61 that refers to a “principal headend” shall apply to the equivalent of the principal headend for an open video system.

(k) *Manner of carriage.* Any provision of § 76.62 that refers to a “cable operator” shall apply to an open video system operator.

(l) *Retransmission consent.* Section 76.64 shall apply to open video systems in accordance with the provisions contained in this paragraph.

(1) Any provision of § 76.64 that refers to a “cable system” shall apply to an open video system. Any provision of § 76.64 that refers to a “cable operator” shall apply to an open video system operator.

(2) Must-carry/retransmission consent election notifications shall be sent to the open video system operator. An open video system operator shall make all must-carry/retransmission consent election notifications received available to the appropriate programming providers on its system.

(3) Television broadcast stations are required to make the same election for open video systems and cable systems serving the same geographic area, unless the overlapping open video system is unable to deliver appropriate signals in conformance with the broadcast station’s elections for all cable systems serving the same geographic area.

(4) An open video system commencing new operations shall notify all local commercial and noncommercial broadcast stations as required under paragraph (1) of this section on or before the date on which it files with the Commission its Notice of Intent to establish an open video system.

(m) *Sports broadcast.* Section 76.67 shall apply to open video systems in accordance with the provisions contained in this paragraph.

(1) Any provisions of § 76.67 that refers to a “community unit” shall apply to an open video system or that portion of an open video system that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas).

(2) Notification of programming to be deleted pursuant to this section shall be served on the open video system operator. The open video system operator shall make all notifications immediately available to the appropriate video programming providers on its open video system. Operators may effect the deletion of signals for which they have received deletion notices unless they receive notice within a reasonable time from the appropriate programming provider that the rights claimed are invalid. The open video

system operator shall not delete signals for which it has received notice from the programming provider that the rights claimed are invalid. An open video system operator shall be subject to sanctions for any violation of this subpart. An open video system operator may require indemnification as a condition of carriage for any sanctions it may incur in reliance on a programmer's claim that certain exclusive or non-duplication rights are invalid.

(n) *Exemption from input selector switch rules.* Any provision of § 76.70 that refers to a "cable system" or "cable systems" shall apply to an open video system or open video systems.

(o) *Special relief and must-carry complaint procedures.* The procedures set forth in § 76.7 shall apply to special relief and must-carry complaints relating to open video systems, and not the procedures set forth in § 76.1514 (Dispute resolution). Any provision of § 76.7 that refers to a "cable television system operator" or "cable operator" shall apply to an open video system operator. Any provision of § 76.7 that refers to a "cable television system" shall apply to an open video system. Any provision of § 76.7 that refers to a "system community unit" shall apply to an open video system or that portion of an open video system that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas).

[61 FR 28708, June 5, 1996, as amended at 61 FR 43177, Aug. 21, 1996]

EFFECTIVE DATE NOTE: At 61 FR 43177, Aug. 21, 1996, in § 76.1506, paragraphs (d), (1)(3), and (m)(2) were revised. These paragraphs contain information collection and record-keeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

**§ 76.1507 Competitive access to satellite cable programming.**

(a) Any provision that applies to a cable operator under §§ 76.1000 through 76.1003 shall also apply to an operator of an open video system and its affiliate which provides video programming on its open video system, except as limited by paragraph (a) (1)–(3) of this

section. Any such provision that applies to a satellite cable programming vendor in which a cable operator has an attributable interest shall also apply to any satellite cable programming vendor in which an open video system operator has an attributable interest, except as limited by paragraph (a) (1)–(3) of this section.

(1) Section 76.1002(c)(1) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows: No open video system operator or its affiliate that provides video programming on its open video system shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which an open video system operator has an attributable interest, or any satellite broadcasting vendor in which an open video system operator has an attributable interest for distribution to person in areas not served by a cable operator as of October 5, 1992.

(2) Section 76.1002(c)(2) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows: No open video system operator or its affiliate that provides video programming on its open video system shall enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor, unless the Commission determines in

accordance with § 76.1002(c)(4) that such a contract, practice, activity or arrangement is in the public interest.

(3) Section 76.1002(c)(3) (i) through (ii) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows:

(i) *Unserved areas.* No open video system operator shall enter into any sub-distribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor in which an open video system operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992.

(ii) *Served areas.* No open video system operator shall enter into any sub-distribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor in which an open video system operator has an attributable interest, with respect to areas served by a cable operator, unless such agreement or arrangement complies with the limitations set forth in § 76.1002(c)(3)(iii).

(b) No open video system programming provider in which a cable operator has an attributable interest shall:

(1) Engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multi-channel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest, or any satellite broadcasting vendor in which a cable operator has an attributable interest for distribution to person in areas not

served by a cable operator as of October 5, 1992.

(2) Enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor, unless the Commission determines in accordance with Section 76.1002(c)(4) that such a contract, practice, activity or arrangement is in the public interest.

**§ 76.1508 Network non-duplication.**

(a) Sections 76.92 through 76.97 shall apply to open video systems in accordance with the provisions contained in this section.

(b) Any provision of § 76.92 that refers to a “cable community unit” or “community unit” shall apply to an open video system or that portion of an open video system that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas). Any provision of § 76.92 that refers to a “cable television community” shall apply to an open video system community. Any provision of § 76.92 that refers to a “cable television system’s mandatory signal carriage obligations” shall apply to an open video system’s mandatory signal carriage obligations.

(c) Any provision of § 76.94 that refers to a “cable system operator” or “cable television system operator” shall apply to an open video system operator. Any provision of § 76.94 that refers to a “cable system” or “cable television system” shall apply to an open video system except § 76.94 (e) and (f) which shall apply to an open video system operator. Open video system operators shall make all notifications and information regarding the exercise of network non-duplication rights immediately available to all appropriate video programming provider on the system. An open video system operator shall not be subject to sanctions for

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any violation of these rules by an unaffiliated program supplier if the operator provided proper notices to the program supplier and subsequently took prompt steps to stop the distribution of the infringing program once it was notified of a violation.

(d) Any provision of §76.95 that refers to a “cable system” or a “cable community unit” shall apply to an open video system or that portion of an open video system that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas).

### §76.1509 Syndicated program exclusivity.

(a) Sections 76.151 through 76.163 shall apply to open video systems in accordance with the provisions contained in this section.

(b) Any provision of §76.151 that refers to a “cable community unit” shall apply to an open video system.

(c) Any provision of §76.155 that refers to a “cable system operator” or “cable television system operator” shall apply to an open video system operator. Any provision of §76.155 that refers to a “cable system” or “cable television system” shall apply to an open video system except §76.155(c) which shall apply to an open video system operator. Open video system operators shall make all notifications and information regarding exercise of syndicated program exclusivity rights immediately available to all appropriate video programming provider on the system. An open video system operator shall not be subject to sanctions for any violation of these rules by an unaffiliated program supplier if the operator provided proper notices to the program supplier and subsequently took prompt steps to stop the distribution of the infringing program once it was notified of a violation.

(d) Any provision of §76.156 that refers to a “cable community” shall apply to an open video system community. Any provision of §76.156 that refers to a “cable community unit” or “community unit” shall apply to an open video system or that portion of an

open video system that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas). Any provision of §§76.156 through 76.158, and 76.163 that refers to a “cable system” shall apply to an open video system.

(e) Any provision of §76.159 that refers to “cable television” or a “cable system” shall apply to an open video system.

(f) Any provision of §76.161 that refers to a “community unit” shall apply to an open video system or that portion of an open video system that is affected by this rule.

### §76.1510 Application of certain Title VI provisions.

The following sections within part 76 shall also apply to open video systems: §§76.71, 76.73, 76.75, 76.77, 76.79, 76.1702, and 76.1802 (Equal Employment Opportunity Requirements); §§76.503 and 76.504 (ownership restrictions); §76.981 (negative option billing); and §§76.1300, 76.1301 and 76.1302 (regulation of carriage agreements); §76.611 (signal leakage restrictions); §76.1803 and 76.1804 (signal leakage monitoring and aeronautical frequency notifications); provided, however, that these sections shall apply to open video systems only to the extent that they do not conflict with this subpart S. Section 631 of the Communications Act (subscriber privacy) shall also apply to open video systems.

[69 FR 57862, Sept. 28, 2004]

### §76.1511 Fees.

An open video system operator may be subject to the payment of fees on the gross revenues of the operator for the provision of cable service imposed by a local franchising authority or other governmental entity, in lieu of the franchise fees permitted under Section 622 of the Communications Act. Local governments shall have the authority to assess and receive the gross revenue fee. Gross revenues under this paragraph means all gross revenues received by an open video system operator or its affiliates, including all revenues received from subscribers and all

carriage revenues received from unaffiliated video programming providers. In addition gross revenues under this paragraph includes any advertising revenues received by an open video system operator or its affiliates in connection with the provision of video programming, where such revenues are included in the calculation of the incumbent cable operator's cable franchise fee. Gross revenues does not include revenues collected by unaffiliated video programming providers, such as subscriber or advertising revenues. Any gross revenues fee that the open video system operator or its affiliate collects from subscribers or video programming providers shall be excluded from gross revenues. An operator of an open video system or any programming provider may designate that portion of a subscriber's bill attributable to the fee as a separate item on the bill. An operator of an open video system may recover the gross revenue fee from programming providers on a proportional basis as an element of the carriage rate.

[61 FR 43177, Aug. 21, 1996]

**§ 76.1512 Programming information.**

(a) An open video system operator shall not unreasonably discriminate in favor of itself or its affiliates with regard to material or information (including advertising) provided by the operator to subscribers for the purpose of selecting programming on the open video system, or in the way such material or information is provided to subscribers.

NOTE TO PARAGRAPH (a): "Material or information" as used in paragraph (a) of this section means material or information that a subscriber uses to actively select programming at the point of program selection.

(b) In accordance with paragraph (a) of this section:

(1) An open video system operator shall not discriminate in favor of itself or its affiliate on any navigational device, guide or menu;

(2) An open video system operator shall not omit television broadcast stations or other unaffiliated video programming services carried on the open video system from any navigational de-

vice, guide (electronic or paper) or menu;

(3) An open video system operator shall not restrict a video programming provider's ability to use part of the provider's channel capacity to provide an individualized guide or menu to the provider's subscribers;

(4) Where an open video system operator provides no navigational device, guide or menu, its affiliate's navigational device, guide or menu shall be subject to the requirements of Section 653(b)(1)(E) of the Communications Act;

(5) An open video system operator may permit video programming providers, including its affiliate, to develop and use their own navigational devices. If an open video system operator permits video programming providers, including its affiliate, to develop and use their own navigational devices, the operator must create an electronic menu or guide that all video programming providers must carry containing a non-discriminatory listing of programming providers or programming services available on the system and informing the viewer how to obtain additional information on each of the services listed;

(6) An open video system operator must grant access, for programming providers that do not wish to use their own navigational device, to the navigational device used by the open video system operator or its affiliate; and

(7) If an operator provides an electronic guide or menu that complies with paragraph (b)(5) of this section, its programming affiliate may create its own menu or guide without being subject to the requirements of Section 653(b)(1)(E) of the Communications Act.

(c) An open video system operator shall ensure that video programming providers or copyright holders (or both) are able to suitably and uniquely identify their programming services to subscribers.

(d) An open video system operator shall transmit programming identification without change or alteration if such identification is transmitted as part of the programming signal.

[61 FR 28708, June 5, 1996, as amended at 61 FR 43177, Aug. 21, 1996]

**§76.1513 Open video dispute resolution.**

(a) *Complaints.* Any party aggrieved by conduct that it believes constitute a violation of the regulations set forth in this part or in section 653 of the Communications Act (47 U.S.C. 573) may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The Commission shall resolve any such dispute within 180 days after the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in §76.7 of this part with the following additions or changes.

(b) *Alternate dispute resolution.* An open video system operator may not provide in its carriage contracts with programming providers that any dispute must be submitted to arbitration, mediation, or any other alternative method for dispute resolution prior to submission of a complaint to the Commission.

(c) *Notice required prior to filing of complaint.* Any aggrieved party intending to file a complaint under this section must first notify the potential defendant open video system operator that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in this part or in Section 653 of the Communications Act. The notice must be in writing and must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

(d) *Contents of complaint.* In addition to the requirements of §76.7 of this part, an open video system complaint shall contain:

(1) The type of entity that describes complainant (e.g., individual, private association, partnership, or corporation), the address and telephone number of the complainant, and the address and telephone number of each defendant;

(2) If discrimination in rates, terms, and conditions of carriage is alleged, documentary evidence shall be submitted such as a preliminary carriage

rate estimate or a programming contract that demonstrates a differential in price, terms or conditions between complainant and a competing video programming provider or, if no programming contract or preliminary carriage rate estimate is submitted with the complaint, an affidavit signed by an officer of complainant alleging that a differential in price, terms or conditions exists, a description of the nature and extent (if known or reasonably estimated by the complainant) of the differential, together with a statement that defendant refused to provide any further specific comparative information;

NOTE TO PARAGRAPH (d)(2): Upon request by a complainant, the preliminary carriage rate estimate shall include a calculation of the average of the carriage rates paid by the unaffiliated video programming providers receiving carriage from the open video system operator, including the information needed for any weighting of the individual carriage rates that the operator has included in the average rate.

(3) If a programming contract or a preliminary carriage rate estimate is submitted with the complaint in support of the alleged violation, specific references to the relevant provisions therein.

(4) The complaint must be accompanied by appropriate evidence demonstrating that the required notification pursuant to paragraph (c) of this section has been made.

(e) *Answer.* (1) Any open video system operator upon which a complaint is served under this section shall answer within thirty (30) days of service of the complaint, unless otherwise directed by the Commission.

(2) An answer to a discrimination complaint shall state the reasons for any differential in prices, terms or conditions between the complainant and its competitor, and shall specify the particular justification relied upon in support of the differential. Any documents or contracts submitted pursuant to this paragraph may be protected as proprietary pursuant to §76.9 of this part.

(f) *Reply.* Within twenty (20) days after service of an answer, the complainant may file and serve a reply which shall be responsive to matters

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contained in the answer and shall not contain new matters.

(g) *Time limit on filing of complaints.* Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs

(1) The open video system operator enters into a contract with the complainant that the complainant alleges to violate one or more of the rules contained in this part; or

(2) The open video system operator offers to carry programming for the complainant pursuant to terms that the complainant alleges to violate one or more of the rules contained in this part, and such offer to carry programming is unrelated to any existing contract between the complainant and the open video system operator; or

(3) The complainant has notified an open video system operator that it intends to file a complaint with the Commission based on a request for such operator to carry the complainant's programming on its open video system that has been denied or unacknowledged, allegedly in violation of one or more of the rules contained in this part.

(h) *Remedies for violations—(1) Remedies authorized.* Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, the requiring carriage, awarding damages to any person denied carriage, or any combination of such sanctions. Such order shall set forth a timetable for compliance, and shall become effective upon release.

(2) *Additional sanctions.* The remedies provided in paragraph (h)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.

[61 FR 28708, June 5, 1996, as amended at 61 FR 43178, Aug. 21, 1996; 62 FR 26239, May 13, 1997; 64 FR 6575, Feb. 10, 1999]

## § 76.1514 Bundling of video and local exchange services.

An open video system operator may offer video and local exchange services for sale in a single package at a single price, *provided that:*

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(a) The open video system operator, where it is the incumbent local exchange carrier, may not require that a subscriber purchase its video service in order to receive local exchange service; and

(b) Any local exchange carrier offering such a package must impute the unbundled tariff rate for the regulated service.

[61 FR 28708, June 5, 1996, as amended at 61 FR 43178, Aug. 21, 1996]

## Subpart T—Notices

SOURCE: 65 FR 53617, Sept. 5, 2000, unless otherwise noted.

## § 76.1601 Deletion or repositioning of broadcast signals.

Effective April 2, 1993, a cable operator shall provide written notice to any broadcast television station at least 30 days prior to either deleting from carriage or repositioning that station. Such notification shall also be provided to subscribers of the cable system.

NOTE 1 TO § 76.1601: No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations. For this purpose, such periods are the four national four-week ratings periods—generally including February, May, July and November—commonly known as audience sweeps.

## § 76.1602 Customer service—general information.

(a) A cable franchise authority may enforce the customer service standards set forth in paragraph (b) of this section against cable operators. The franchise authority must provide affected cable operators 90 days written notice of its intent to enforce standards.

(b) Effective July 1, 1993, the cable operator shall provide written information on each of the following areas at the time of installation of service, at least annually to all subscribers, and at any time upon request:

(1) Products and services offered;

(2) Prices and options for programming services and conditions of subscription to programming and other services;